Supreme Court, U.S.
FILED
MAR 2 2 2010
OFFICE OF THE CLERK

No. 09-678.

IN THE

Supreme Court of the United States

Patricia Simon and John Simon,
Petitioners,

v.

The United States of America,
Respondent.

On Petition For Writ Of Certiorari
To The U.S. Court Of Appeals For The First Circuit.

PETITIONERS' REPLY BRIEF.

Paul S. Hughes, Esq. (BBO #243780)
Counsel of Record for the Petitioners
2120 Commonwealth Avenue, Suite 200
Newton, Massachusetts 02466
Telephone: (617) 244-5620
Email: pashughes@aol.com

March 22, 2010

TABLE OF CONTENTS

Page

Table of Contents ..... **i**

Table of Citations ..... **ii**

I. The Petitioners' Claim constitutes both "Negligent Transmission" and "Loss." 1

II. The Words "Loss" or "Miscarriage" or "Miscarriage" Are Not Inherently Construed to Include Grossly Negligent or Intentional Conduct. Exception. 2

III. The Second Circuit Court of Appeals has Ruled that the "Postal Matters" Exception is Limited to Negligent Conduct, and Does Not Bar Claims for Loss Resulting from Intentional Conduct. 3

IV. Conclusion. 6

TABLE OF AUTHORITIES.

CASES; PAGES

Avery vs. United States, 434 Fed. Supp. 937, 945 (Dist. Ct. Conn. 1977).....3

Birnbaum vs. United States, 436 F. Supp. 967, 975 (E.D.N.Y., 1977), rev'd in part on other grounds, 568 F. 2d 319 (2d Circ. 1978).....4

Birnbaum vs. McMillen, 588 F. 2d 318 (2d Circ. 1978)..... 4, 5, 6

Dolan vs. U.S. Postal Service, 546 U.S. 481, 490 (2006). 2, 6

Levasseur vs. U.S. Postal Service, 543 F. 3d 23 (1st Circ. 2008)..... 4, 5

Marine Insurance Co. vs. United States, 378 F. 2d 812 (2d Circ.), cert. denied, 389 U.S. 953 (1967)..... 5, 6

Raila vs. United States of America, 355 F. 3d 118 (2d Circ. 2004).....4

STATUTES;

28 U.S.C. Section 2680 (b)..... 1, 3

28 U.S.C. Section 2680 (h).....3

CONGRESSIONAL RECORD.

Hearings on S. 2690 before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong. 38 (1940).

The Petitioners wish to reply to the following contentions set forth by the United States in opposition to the Petitioner's Petition for Writ of Certiorari:

(1) The United States' contention that the Petitioner's claim is for "loss," as opposed to "negligent transmission;" (pages 3-4);

(2) Its argument that the very words of the exception, "....loss, miscarriage or negligent transmission," by themselves must be interpreted to bar a claim for "loss" or "miscarriage" resulting from conduct which constitutes gross negligence or intentionally wrongful conduct (Opposition, pages 4-5); and

(3) Its belief that there is no split between the First and Second Circuit Courts of Appeals concerning whether the "postal matters exception," 28 U.S.C. Section 2680 (b), bars claims resulting from conduct which constitutes "gross negligence" or intentionally wrongful conduct; (Opposition, pages 5-6).

I. The Petitioners' Claim Constitutes both "Negligent Transmission" and "Loss."

The Petitioners have alleged that Postal Service knowingly placed the box forwarding their mother's cremated remains in an insecure area, and that both the box and the Postal Station's receipts from the day were stolen. A Postal Employee's placement of the box in an insecure area is certainly a step in the "transmission" of the box and its contents. It is arguably more a matter of "transmission" than "loss," as if the box was stolen, it would arguably not be a "loss" caused by the Postal Employee, unless the Postal Employee were personally involved with the theft. In any event, these facts could be considered both "transmission" and/or "loss."

II. The Words "Loss" or "Miscarriage" Are Not Inherently Construed to Include Grossly Negligent or Intentional Conduct.

The United States contends that the words "loss" or "miscarriage" have such a common meaning that the Court should not construe them in light of the statutory language of "negligent transmission." Opposition, page 5. However, this argument is absolutely inconsistent with the Court's observation in of Dolan vs. United States, 546 U.S. 481 (2006),

> " ... The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purposes and context of the statute, and consulting any precedents or authorities that inform the analysis. Here, we conclude that both context and precedent require a narrower reading, so that 'negligent transmission' does not go beyond negligence causing mail to be lost or arrive late, in damaged condition, or to the wrong address. ...The phrase does not comprehend all negligence occurring the course of mail delivery..."

Dolan, at page 486.

Another leading rule of statutory construction is that a statute must be construed to accomplish an harmonious and rational result. To this end, the Opposition does not suggest any plausible reason why Congress would only limit "transmission" to omissions by Postal Employees which were no worse than "negligent," but would extend the bar to claims resulting from Postal Employees

"loss" or "miscarriage" even if the employees' actions were grossly negligent or intentional. Such an uneven and imbalanced construction of the "postal matters" exception should not be permitted.

Moreover, the Opposition's contention, that as Congress expressly qualified "transmission" by the adjective "negligence" evidences an intent that "loss" or "miscarriage" not be so limited, is fundamentally unsound, as the words "loss" or "miscarriage" themselves suggest no worse than negligent conduct, without the necessity of adding the word, "negligent." Human experience is that one who says he or she "lost" something does not mean that he or she willfully or maliciously destroyed or stole the item, but only is confessing to an event of everyday human imperfection. Conversely, if Congress had intended "loss" to extend to "theft," Congress would have explicitly included "theft" in the "postal matters" exception. See Avery vs. United States, 434 Fed. Supp. 937, 945 (Dist. Ct. Conn. 1977), in which the Court compared the "postal matters" exception, Section 2680 (b), with the "intentional tort" exception, Section 2680 (h). Congress' selection of the words "loss," "miscarriage" and "negligent transmission," both of which connote negligence, in the "postal matters" exception of Section 2680 (b) and its specific inclusion of intentional torts in the bar from recovery set forth in Section 2680 (h), establish its intent that the "postal matters" exception be limited to conduct no more culpable than negligent.

III. The Second Circuit Court of Appeals has Ruled that the "Postal Matters" Exception is Limited to Negligent Conduct, and Does Not Bar Claims for Loss Resulting from Intentional Conduct.

The Petition, at pages 9 and 10, cites the statement of the District Court in the Second Circuit, that the purpose

for the enactment of the "postal matters" exception was,

> "Congress was concerned with shielding the Courts from the landslide of suits that might be generated from the potential landslide of suits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year."
>
> Birnbaum vs. United States, 436 F. Supp. 967, 975 (E.D.N.Y. 1977), rev'd in part on other grounds, 588 F. 2d. 319 (2d Circ. 1978). See also Railla vs. United States, 355 F. 3d 118, 122 (2d Circ. 2004).

The District Court's ruling was appealed to the Second Circuit, which affirmed the District Court's reasoning, stating, in a case of "negligent transmission," that the language of the exception itself indicates that it was not aimed to encompass intentional acts, but only negligent omissions, and that on the facts of the case, the letters were not lost or miscarried, so as to exclude the claim based on the exclusion's reference to "loss" or "miscarriage." The Second Circuit Court of Appeals only reversed so much of the District Court decision as ordered the Postal Department to write letter of apology, as the Federal Tort Claims Act only allows money damages and not equitable relief, but otherwise affirmed the District Court decision. Birnbaum vs. McMillen, 588 F. 2d 319, 328 (2d Circ. 1978).

The Opposition, on pages 6 and 7, relies on the discussion of the First Circuit Court of Appeals in Levasseur vs. USPS, 543 F. 3D 23, 24 (1ST Cir. 2008), in which the First Circuit (1) interpreted the Birnbaum decision as referring solely to the words

"negligent transmission" and (2) further stated that any interpretation of the Birnbaum decision as limiting "loss" or "miscarriage" to negligent conduct would be inconsistent with the Second Circuit's decision in Marine Insurance Co. vs. United States, 378 F. 2d 812 (2d Circ.), cert. denied, 389 U.S. 953 (1967). However, the Birnbaum decision itself forecloses both of these constructions. The Second Circuit wrote, concerning its construction of the degree of culpable conduct which the "postal matters" forecloses recovery;

> "We turn next to the postal exception, which also requires little discussion. The exception relates to 'any' claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter."
>
> "The language of the exception itself indicates that it was not aimed to encompass intentional acts. Had Congress intended to bring intentional disturbance of the integrity of a letter within the postal exception, it would not have used the term 'negligent transmission.' Nor were the letters lost or miscarried. 'Miscarriage' in the context of the mail means misdelivery." Birnbaum, at page 328.

The Second Circuit, in its aforementioned, unqualified language, stated that the exception was not aimed to encompass intentional acts.

Towards the second point raised in Levasseur, the Second Circuit in Birnbaum also expressly disposes of the contention that its decision was inconsistent with its holding in Marine Insurance. Insurance, stating, in a footnote,

> "...Marine Insurance held that where customs agents had temporarily removed and treated a

> mailed package of emeralds with a fluorescent powder to detect a thief, the subsequent loss of the package by postal authorities fell within the postal exception. The claim in Marine Insurance was not for redress because of the temporary removal and treatment of the package, but for its subsequent 'loss' from the postal system, which would have occurred even if the interception had not taken place." Birnbaum, at page 328, fn 20, citing from Marine Insurance, 378 F. 2d at 815.

As stated by the Second Circuit, the Marine Insurance appeal was not decided on the proposition that the "postal matters" exception foreclosed claims resulting from "intentional conduct," but rather that the actions of the postal workers were not the ultimate, "proximate" cause of the loss.

IV. Conclusion.

The decision of the First Circuit Court of Appeals from which the Petitioners request certiorari holds that the "postal matters" exception is not limited to conduct of Postal Employees' which is no worse than negligent, but bars claims for "loss" or "miscarriage" resulting from actions of Postal Employees which constitute "gross negligence" or even intentional conduct. The position of the United States, that this holding is not in conflict with both the Supreme Court's holding in Dolan and with the holdings of the Second Circuit, is incorrect. The viability of the Petitioners' claim was decided by the Circuit in which they suffered their loss. The Petitioners request that the United States Supreme Court grant certiorari, so that the claims of the Petitioners and any future claimants will not be determined by the inconsistent interpretations of the "postal matters" exception by the different Circuit Courts of Appeals.

Respectfully submitted,

Paul S. Hughes
Counsel of Record
2120 Commonwealth Ave.
Suite 200
Newton, MA 02466
(617) 244-5620
pashughes@aol.com

Attorney for Petitioners